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# Supreme Court of the United States

**October Term, 1968**

No. 1045

PETER OTTLEY, as President, and PETER BYRNE, as Secretary-Treasurer, of Local 144, Hotel & Allied Service Employees Union, Service Employees International Union, AFL-CIO,

*Appellant,*

*against*

THE LONG ISLAND COLLEGE HOSPITAL,

*Appellee.*

IN THE MATTER OF

PETER OTTLEY, as President, and PETER BYRNE, as Secretary-Treasurer, of Local 144, Hotel & Allied Service Employees Union, Service Employees International Union, AFL-CIO,

*Appellant,*

*against*

THE LONG ISLAND COLLEGE HOSPITAL,

*Appellee.*

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

## APPELLANT'S REPLY BRIEF

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## APPELLANT'S REPLY BRIEF

Appellant submits this brief in reply to appellee's motion to dismiss the appeal herein. The order of the points follows that of appellee's argument.

Preliminarily, certain factual statements must be disputed:

1. Appellee states that Section 713 provides that "it would *continue to be unlawful* for such employees and their unions to strike or *picket* non-profitmaking hospitals, . . ."

(Emphasis added.) (Appellee's Brief, p. 4). The statute does not so read (A37) *, nor had it ever been unlawful, prior to the enactment of Section 713, for hospital employees to picket. See cases cited, Jurisdictional Statement, p. 13.

2. The view that the availability of compulsory arbitration was a *quid pro quo* for the prohibition against strike or picketing is neither partisan nor limited "to protagonists of unions of hospital employees" (Appellee's Brief, ftn., p. 3). Both the majority and minority opinions of the Court of Appeals made clear that the dispute procedures were designed as a balance to the deprivations created by Section 713. The majority said, for example:

> "Further, the Legislature well knew that, although the courts had enjoined hospital employees from striking and that it was in the public interest to continue the prohibition against strikes, it would have been unjust to deprive hospital employees of their most potent economic weapon without granting them adequate means of securing relief against substandard wages and working conditions" (A8-9).

The majority thereafter outlined the three "vital amendments" by which the Legislature attempted to resolve these problems; Sections 713, 715 and 716.

The minority said:

> "As we interpret section 716, a prompt submission of disputes to collective bargaining and compulsory arbitrations was a *quid pro quo* for the legislative prohibition of strikes in nonprofit hospitals. Such an analysis, we submit, preserves the equality of bargaining power, considered essential to the entire Act" (A26).

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* References to "A" are to Appendix to Jurisdictional Statement.

3. Appellee accuses the New York State Labor Relations Board of "holding that 21 votes constituted a majority of 46 votes" (Appellee's Brief, p. 4). Appellee's own affidavit (R., Vol. I, pp. 12-14, paras. 9 and 10) * and the affidavit of Commissioner Jay Kramer (R., Vol. I, p. 80) completely refute this statement and raise a doubt only as to the purpose for which it was offered.

4. Appellee's statement " . . . as the record clearly shows, appellant contended that Section 716 . . . authorized State officials to compel the Hospital to submit to fact-finding and arbitration procedures with respect to the union's representative status" (Appellee's Brief, p. 11) is an unwarranted distortion of the record. Not surprisingly, appellee offers no citation to the record. Appellant contended only that its representative status had been established; that it was entitled to have *its contract demands* submitted to fact-finding and arbitration in the face of the Hospital's refusal to bargain with it (See e.g. R., Vol. II, p. 62).

## POINT I

**The issues on this appeal arise from an actual controversy within the jurisdiction of the Court.**

The Court of Appeals ordered that the compulsory arbitration in which the appellant and appellee were participating under the direction of the Industrial Commissioner be stayed.

Appellee contends that although the appellant is deprived of the remedy of arbitration, it *can* strike and

* References to "R" are to the Record on this appeal.

picket, albeit in violation of Section 713, and, since it has not done so, there is no case or controversy within this Court's jurisdiction.

In support of its contention, appellee says: "the decision of the Court of Appeals does not in any way restrict striking, picketing or publicity by the Union . . ." (Appellee's Brief, p. 6). The decision did not have to; Section 713 does.

The appellee's argument is couched in the misleading frame of a separate statute, Section 716 standing alone, so as to claim that the statutory restraint on strike or picketing has not been placed in issue. New York did not enact such a statute. Sections 713 and 716 were and are part of one statute which can only be read in *pari materia.**

Neither the cases cited by appellee ** nor any other case defining "case" or "controversy" requires that the appel-

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* New York Law is clear that it is the duty of the courts to construe all parts of a statute together. See McKinney's Book 1, "Statutes" authoritative and semi-official treatise on the construction of statutes enacted by the legislature in New York. Section 221, which deals generally with the construction of statutes in *pari materia,* states that such statutes "are to be construed together as forming part of the same statute . . . (citing authorities). Section 97 is in accord. Appellee has no basis for claiming that the Court of Appeals violated the canons of statutory construction.

** The *Asbury Hospital* case (326 U. S. 207) and *Longshoremen's* case (347 U. S. 222) cited by appellee, if read in full, are clearly distinguishable. The point in issue in *Asbury* which the Court deemed hypothetical, had not in fact been raised before any state court and was clearly an anticipatory, rather than actual, threat to any right. *Longshoremen's* sought a declaration that a section of the Immigration and Naturalization Act, if applied at all, would invade constitutional rights. In the case at bar, the arbitration was stayed, while Section 713's restraints were not removed.

lant violate Section 713's ban on strike or picketing in order to assert that its rights under that Section and Section 716 are actually, and not hypothetically, impaired. *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249.

Appellee deliberately misses the point; if there were no Section 713 restraint on strike and picketing, the availability of substitutes would be academic and might, in fact, pose only hypothetical questions. If the Union could use self-help, the Court's construction of Section 716 would not have created an invasion of appellant's rights; it could ignore it and strike or picket. The effect of the twin impediments to any remedy (Section 713 and the Court's construction of Section 716) is not hypothetical. The Union appellant can neither strike, picket nor avail itself of the statutory alternative—compulsory arbitration.

## POINT II

**The Court of Appeals necessarily passed on the questions presented on this appeal.**

The Court of Appeals had before it in this case the first statute ever enacted in New York providing for compulsory arbitration while restraining strike or picketing. The issue of the validity of the legislative experiment in avoiding labor disputes was of such compelling importance that not only did the parties brief and argue the meaning and the constitutionality of the statute exhaustively, but a substantial number of *amicus* briefs were submitted.

Appellee suggests, however, that the Court of Appeals' decision, in "resolving that question of statutory construction, could in no way involve determining the meaning and constitutionality of that section . . ." (Appellee's Brief, pp. 8-9).

Appellee's argument answers itself. The cases cited by appellee for its proposition that the Court either did not pass on any federal question, or that the federal question, was not necessary to its decision, do not support its proposition.*

## POINT III

**The precise federal question sought to be reviewed did not arise until the Court of Appeals rendered its decision, nor could its decision reasonably have been anticipated.**

The validity of the amendments to the New York State Labor Relations Act had never before been passed upon by the highest court of New York. Appellee attacked its validity from the outset of this litigation; both proceedings sought, in part, a declaration that Section 716 violated the Constitution of the United States and was, for other reasons, an invalid exercise of legislative power.

The validity of the statute was also placed in issue by other actions which were commenced during the course

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* In *Lynch*, 293 U. S. 52, the petitioners had not sought amendment to the remittitur, although they had an opportunity to do so; in *Honeyman*, 300 U. S. 14, 26, this Court remanded the case to the state court, "in order that uncertainty be removed and the precise nature of the federal question, how it was raised, and the grounds of its disposition may be definitely set forth; so that we may be able to decide whether a substantial federal question within our jurisdiction has necessarily been determined."

Following the decision of the Court of Appeals, appellant moved for amendment of the remittitur for just that purpose; to clarify the federal questions created by the court's decision. The Court of Appeals summarily denied the motion.

The citation of the *Oilworkers* case (361 U. S. 363), is not helpful. There, an injunction against a strike was separated from other penalties against the strikers. As to the injunction, which had long since been vacated at the time of the appeal, the issue was considered moot.

of this litigation.* In those cases, the hospital plaintiffs also argued that the Act denied charitable hospitals the equal protection guaranteed by the Federal Constitution in that they were the only class of employers subject to a law providing for compulsory arbitration.

None of the judges who had heard any of the attacks upon the validity of the statute even suggested the possibility of the decision ultimately reached by a divided Court of Appeals; that is, the implicit holding that the statute was not invalid *if* read so as to make arbitration or fact-finding available *only* to a union of hospital workers which had received judicial approval of its certification. If that idea had not occurred to any of the more

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* In *The Park Avenue Clinical Hospital* v. *Kramer, et al.*, 48 Misc. 2d 826, 266 N. Y. S. 2d 147 (Sup. Ct. Monroe Cty., 1966) the employer argued that the sections of the Act in question were unconstitutional for the reason that charitable hospitals are the only class of employers subject to them; that the employer is subjected to a law prohibiting picketing, strikes and lockouts and providing for compulsory arbitration, whereas profitmaking hospitals are not, and, therefore, it is denied the equal protection guaranteed by both Federal and State constitutions. The Court, at Special Term, rejected this contention.

On appeal, the Appellate Division (26 A. D. 2d 613, 271 N. Y. S. 2d 747 (4th Dept.), holding that the provisions involved were valid and constitutional, declared that the employer's attack on Section 716 was premature and that the constitutionality of this section should not be reached or passed upon in this action. The Court noted that all that had taken place in this case was that a union had filed a petition with the Board, pursuant to Section 705, asking to be certified as collective bargaining representative of certain groups of employees; that following an informal conference, the employer commenced this action. The Court concluded that the employer procedurally was far removed from any of the provisions of Section 716. The Court of Appeals affirmed the holding of the Appellate Division (19 N. Y. 2d 958).

Similar results were reached in *Crouse Irving Hospital* v. *Kramer*, 25 A. D. 2d 817 (4th Dept. 1966); *St. Joseph's Hospital* v. *Kramer*, 25 A. D. 2d 817 (4th Dept. 1966); and *Syracuse Memorial Hospital* v. *Kramer*, 25 A. D. 2d 817 (4th Dept. 1966).

than twenty Special Term or Appellate Division judges who had examined the statute, the appellant can hardly be charged with obtuseness or procrastination in failing to anticipate the decision of the Court of Appeals. The statute itself does not, in terms, provide for such prior judicial approval. Nothing in the legislative history suggested that it was the intent of the Legislature to create such a condition upon the availability of fact-finding or arbitration. None of the judges of Special Term, nor of the Appellate Division, discerned any merit in the appellee's argument that the Legislature must have intended such judicial review.

Even the Court of Appeals, upon the initial argument of this case, was equally divided. It is impossible therefore to fairly complain that the appellant should have anticipated the decision of the Court of Appeals.

## POINT IV

**The Court of Appeals' failure to explicitly set forth the basis for rejecting challenges to the statute's validity cannot defeat this Court's jurisdiction.**

The answer to appellee's statement that the Court of Appeals did not pass on the validity of the statutory sections in question is found in the decision of the Court. Appellee argues that the decision held that, *whether 716 was valid or not,* it was not intended to apply to certain disputes. The appellee thus asks that the decision of the Court of Appeals be read as saying either that (i) Section 716 is invalid and doesn't apply, or that (ii) Section 716 is valid and does not apply. It is impossible to read the opinion of the Court of Appeals as saying anything other than the statute is valid but does not apply to the facts presented. To suggest that the Court did not pass

upon the validity of the section, but made a determination as to whether or not it was applicable to a particular fact situation, is to impute a certain lapse of logic to the Court. If the statute was invalid, what difference would it have made whether or not it applied to the particular facts?

It is certainly the law that an appeal will lie under Section 1257(2) even though the state court is not explicit in overruling a challenge on federal grounds to the validity of the statute. As long as the statute is sustained, the court has necessarily rejected such an objection. Its silence in this respect is immaterial and cannot destroy the right to appeal. *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282-3.

The validity of a statute is also said to have been sustained within the meaning of 1257(2) when the state court holds the statute applicable to a particular set of facts, as against the contention that such application is invalid on federal grounds. This is true even though the statute on its face bears no federal impediment. *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282.*

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* In *Dahnke*, this Court said, in pertinent part:

"That the statute was not claimed to be invalid in toto and for every purpose does not matter. A statute may be invalid as applied to one state of facts and yet valid as applied to another . . . Besides a litigant can be heard to question a statute's validity only when and so far as it is being or about to be applied to his disadvantage . . . Neither does it matter on what ground the court upheld and enforced the statute. The provisions . . . show that in cases where the validity of a state statute is drawn in question because of alleged repugnance to the Constitution, the mode of review depends on the way in which the state court resolves the question . . . The provisions take no account of the particular grounds or reasons on which the decision is put." (at p. 289) (citations omitted)

## CONCLUSION

**For each of the reasons set forth above and in the Jurisdictional Statement, appellant respectfully submits that the motion to dismiss this appeal be denied.**

Respectfully submitted,

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